Report Pursuant to 83 Ill. Adm. Code 200.520
Of the Commission's Rules of Practice

Docket Nos.: 09-0548/09-0549 Consol.
Bench Date: 07/28/10
Deadline: N/A

TO: The Commission

FROM: Administrative Law Judge D. Ethan Kimbrel

DATE: July 8, 2010

SUBJECT: Apple Canyon Utility Company and Lake Wildwood Utilities Corporation,

Proposed General Increase in Water Rates.

RECOMMENDATION: Deny the relief requested in the Intervenors' Petition for Interlocutory Review.

I. INTRODUCTION

Leave to Intervene was granted to Lake Wildwood Association, Inc. ("LWA") and Apple Canyon Lake Property Owners' Association, Inc. ("ACLPOA"), (collectively, the "Intervenors") in the above consolidated matter on December 15, 2009 and January 14, 2010, respectively. Pursuant to the agreed upon schedule, the evidentiary hearing was held on May 18, 2010 and Apple Canyon Utility Company and Lake Wildwood Utilities Corporation (the "Companies"), Staff of the Illinois Commerce Commission ("Staff"), and the Intervenors filed simultaneous Initial Briefs on June 15, 2010.

On June 22, 2010, Staff filed its Motion to Strike certain portions of Intervenors' Brief arguing in pertinent part that both public comments from the public hearings held in this matter and statements posted to the Commission's e-docket system in this docket should be struck from the brief. That same day, the Administrative Law Judge ("ALJ") sent notice that Responses to Staff's Motion to Strike would be due on or before June 24, 2010, and Replies to the Responses to Staff's Motion to Strike would be due on or before June 25, 2010. The Intervenors filed their Objection and Response to Staff's Motion on June 24, 2010. The Companies did as well.

On June 25, 2010, the ALJ granted Staff's motion holding that:

> Both public comments made at Illinois Commerce Commission conducted public forums and comments posted to the Commission website must be made available to the Administrative Law Judge and reviewed when rendering a decision. However, the availability of the comments and review thereof by the ALJ does not, in and of itself, make the comments a part of the record of evidence."

On July 1, 2010, the Intervenors filed their Petition for Interlocutory Review arguing that the ALJ's ruling was contrary to law and should be overturned by the Commission. Staff filed its Response to the Intervenors' Petition on July 7, 2010.

On July 8, 2010, the People of the State of Illinois (the "People" or "AG") filed its Petition for Leave to Intervene for the limited purpose of addressing the Intervenors' Petition for Interlocutory Review. The Petition was granted and the People filed its Response on the same day.

II. AG and INTERVENORS' POSITION

The AG and Intervenors rely on two sections of the Public Utilities Act ("PUA") to conclude that comments made at public hearings and posted on the Commission e-docket system are part of the record and thus permit parties to reference them in their briefs. Section 5/8-306(n) provides that:

> "Reports and comments made during or as a result of each public forum must be made available to the hearings officials and reviewed when drafting a recommended or tentative decision, finding or order pursuant to Section 10-111 of this Act." 220 ILCS 5/8-306(n). P.A. 94-950, effective June 27, 2006.

The AG and Intervenors state that in this same vein in 2007, the legislature amended the Public Utilities Act further, requiring the Commission to "provide a web site and a toll-free number to accept comments from Illinois residents regarding any matter under the auspices of the Commission or before the Commission." 220 ILCS 5/2-107. P.A. 95-0127, effective August 13, 2007.

They argue that the addition by the legislature of these specific provisions that require hearing officials to review the public comments makes such public comments a part of the record to be reviewed and thus permits parties to reference them in their briefs for the purpose specified under the Public Utilities Act. They add that by striking the references to the public's comments in the Intervenors' Initial Brief, the ALJ improperly ignored these sections of Public Utilities Act, thereby rendering its language meaningless.

III. STAFF AND THE COMPANIES' POSITION

Staff argues that the Intervenors' Initial Brief inappropriately mixes two separate and distinct records in violation of Section 10-103 of the PUA and Section 10-35 of the Illinois Administrative Procedure Act (the "APA"), both of which specifically require any Commission decision to be based exclusively upon the record for decision in the proceeding. 220 ILCS 5/10-103; 5 ILCS 100/10-35. Section 10-103 of the Act mandates that:

> In all proceedings, investigations or hearings conducted by the Commission, except in the disposition of matters which the Commission is authorized to entertain or dispose of on an ex parte basis, *any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case*, which shall include only the transcript of testimony and exhibits together with all papers and requests filed in the proceeding, including, in contested cases, the documents and information described in Section 10-35 of the Illinois Administrative Procedure Act.
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> 220 ILCS 5/10-103 (emphasis added).

Section 10-35 of the Illinois Administrative Procedure Act identifies the record in contested cases as including:

> (1) All pleadings (including all notices and responses thereto), motions, and rulings.
> (2) All evidence received.
> (3) A statement of matters officially noticed.
> (4) Any offers of proof, objections, and rulings thereon.
> (5) Any proposed findings and exceptions.
> (6) Any decision, opinion, or report by the administrative law judge.
> (7) All staff memoranda or data submitted to the administrative law judge or members of the agency in connection with their consideration of the case that are inconsistent with Section 10-60 [relating to ex parte communications].
> (8) Any communication prohibited by Section 10-60. No such communication shall form the basis for any finding of fact.
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> 5 ILCS 100/10-35; *see also* 83 Ill. Adm. Code § 200.700.

Staff surmises that nowhere under either the Act, the APA or under Commission rules are unsworn statements at public forums included in the record for decision, on which the Commission may rely in reaching is decision. The APA expressly states that "findings of fact shall be based *exclusively* on the evidence and on matters officially noticed." 5 ILCS 100/10-35. Staff supports its argument with case law holding that

Commission decisions must be based exclusively on the evidence. In other words, "findings must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or considered, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such." *Chicago & E.I. Ry. Co. v. Illinois Commerce Comm'n*, 341 Ill. 277, 285 (Ill. 1930), *quoting Atchison*; *Citizen's Utility Bd. v. Illinois Commerce Comm'n*, 291 Ill. App. 3d 300, 308 (Ill. App. Ct. 1997) ("The Commission's findings here contain no reference to the evidence adduced and its argument on appeal, therefore, cannot provide evidentiary support."); *Cerro Copper Products v. Illinois Commerce Comm'n*, 83 Ill.2d 364, 370 (Ill. 1980) (findings of fact must be based on the evidence in the record or the order will be set aside).

Staff concludes that public comments, of the type that the Intervenors quote in Section III and refer to in Section VI (A)(4) of their Initial Brief, are not included in those matters that constitute the record for decision in this proceeding and that while the Commission might well take note of the fact that this proceeding has engendered public interest and comment, the specifics of these public comments, are neither competent evidence nor a cognizable part of the record for decision.

The Companies supported Staff's Motion to Strike and generally agreed with the arguments made therein in support of the requested relief.

IV. DISCUSSION AND RECOMMENDATION

Staff's Motion to Strike was properly granted. Pursuant to 220 ILCS 5/8-306(n) and 220 ILCS 5/2-107, I agree that the public comments and postings must be made available to the ALJ when drafting a recommended or tentative decision, finding or order. This, however, does not make them a part of the record of "evidence" in the proceeding. As Staff noted in its Motion to Strike, while the Commission may review and take note of the fact of the public comments, thus meeting the requirements of Sections 8-306(n) and 2-107, the specifics of these public comments are neither competent evidence nor a cognizable part of the record for decision, which renders them inappropriate bases for deciding questions of fact or law. As Staff so eloquently puts it in its Response to the Intervenors' Petition for Interlocutory Review "There is the record for decision, which must consist solely of evidence. And there is the public commentary record, which must be made available and reviewed."

Accordingly, for the reasons stated herein I recommend that the Commission deny the relief requested in the Petition for Interlocutory Review.

EK:fs